In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 799

ROBERT JOSEPH MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–6) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1965. The petition for a writ of certiorari was filed on December 4, 1965, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government properly obtained possession of stolen travelers checks which petitioner had left in an unlocked briefcase in an unlocked closet

in the apartment of his landlady, who discovered the checks after telephoning federal agents and opening the briefcase at their suggestion.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Nevada of illegal possession of stolen travelers checks, in violation of 18 U.S.C. 2113(c) (I R. 3, 53).[1] He was sentenced to imprisonment for five years with the provision, under 18 U.S.C. 4208(a)(2), that he may be paroled at any time (I R. 62). The conviction was affirmed on appeal, one judge dissenting (Pet. App. 1–6).

On October 8, 1963, a savings and loan association in Phoenix, Arizona, discovered the theft of a quantity of travelers checks (III R. 16–27). On October 11, agents of the Federal Bureau of Investigation instituted a surveillance of petitioner's apartment in Las Vegas, Nevada (III R. 41–45) [2] and informed petitioner's landlady, who lived in an apartment in an adjoining building (II R. 17, 20–21), that the surveillance was being made (III R. 62). On the

[1] The certified record is in three volumes and will be cited by volume number and page. Vol. I contains papers filed in the district court, vol. II consists of the transcript of the pre-trial hearing on petitioner's motion to suppress and vol. III consists of the trial transcript.

[2] Petitioner was known to have been acquainted with the traffic in stolen travelers checks in the area. On October 4, 1963, petitioner voluntarily came to the F.B.I. office in Las Vegas and—stating he was getting married and wanted to "get some things behind him" (III R. 92)—discussed with federal agents certain transactions in stolen travelers checks which he claimed occurred in May 1963 (II R. 6–11; III R. 93–95).

morning of October 12, federal agents observed petitioner leave his building carrying a brown leather briefcase and enter the building in which the landlady, a Mrs. Caldwell, lived. A few minutes later, petitioner was seen returning without the briefcase (II R. 13–16; III R. 39–41).

Mrs. Caldwell testified that on the morning in question petitioner came to her apartment—which he had never occupied (II R. 34)—and asked her to hold his briefcase for him and not to give it to anyone else (II R. 29–30). As on the few previous occasions that petitioner had left his briefcase with the landlady, he did not tell her why he was leaving it there (II R. 33, 36). No other tenants had ever left articles with Mrs. Caldwell for safekeeping (III R. 64).

Petitioner placed his briefcase in Mrs. Caldwell's dining room closet (II R. 33), which was not, and could not be, locked (III R. 67, 72). Shortly after petitioner left, Mrs. Caldwell telephoned the F.B.I. office to report what had happened (II R. 22; III R. 68), and the agent she spoke to suggested that she open the briefcase. At first, she thought the briefcase was locked (II R. 22), but when the agent suggested she try again, she discovered that it was unlocked. Upon opening the briefcase, Mrs. Caldwell observed and reported that it contained travelers checks (II R. 22–23; III R. 58). The agent then told her to hold on to the briefcase (II R. 23; III R. 58).

On Monday, October 14, a federal agent telephoned Mrs. Caldwell and told her that he could obtain a search warrant for the brief case (II R. 24). She replied, however, that "it wasn't necessary" (II R.

24–26; III R. 75). Mrs. Caldwell testified that she would have given the agent the briefcase even if he had not told her he could get a warrant (II R. 25–26). She explained that she was nervous and upset "to find that I was put in such a compromising situation" (III R. 59) and that she was very uneasy about having the briefcase in her possession (II R. 25; III R. 60, 71).

Later on October 14, federal agents came to Mrs. Caldwell's apartment, removed the contents of the briefcase, and gave her a receipt therefor (II R. 25, 29; III R. 75). Among the contents were travelers checks which had been stolen from the savings and loan association in Phoenix; these were introduced in evidence at the trial (see III R. 4–5).

ARGUMENT

Since the judgment below was entered on November 3, 1965, the petition for a writ of certiorari, filed on December 4, 1965, is out of time under Rule 22(2) of the Rules of this Court.

In any event, there was no error in the admission of the travelers checks at petitioner's trial. The question of the reasonableness of the manner in which the government obtains property introduced as evidence in criminal trials depends on the circumstances of each particular case. *United States* v. *Rabinowitz,* 339 U.S. 56, 63. The circumstances of the present case were properly evaluated by the lower courts and there is no occasion for further review.

The government obtained the travelers checks involved here from Mrs. Caldwell, whose actions in

endeavoring to disassociate herself from any implication in petitioner's crime were entirely reasonable. As the court below properly concluded, Mrs. Caldwell "was merely acting as any responsible citizen should in her position" (Pet. App. 3). Mrs. Caldwell had obtained the briefcase in a legitimate fashion from petitioner, who—in seeking to avoid detection by placing his unlocked briefcase in an unlocked closet in the landlady's apartment—must be said to have assumed the risk that his property would be examined. The property in question, being in the actual lawful possession of Mrs. Caldwell, was properly placed by her into the hands of federal officers. See *Rees* v. *Peyton,* 341 F. 2d 859 (C.A. 4); *Sartain* v. *United States,* 303 F. 2d 859 (C.A. 9), certiorari denied, 371 U.S. 894; *United States* v. *Eldridge,* 302 F. 2d 463 (C.A. 4); *United States* v. *Sferas,* 210 F. 2d 69 (C.A. 7), certiorari denied *sub nom. Skally* v. *United States,* 347 U.S. 935.

The cases relied on by petitioner (Pet. 6–7) are not in point. Most of them, like *Chapman* v. *United States,* 365 U.S. 610, involved the question whether a valid search of premises occupied by a suspect could be based on the consent of the suspect's landlord or employer, or the agents of the hotel in which the premises were located. As Chief Judge Sobeloff stated in *Eldridge, supra,* 302 F. 2d at 465, "If Chapman sheds any light whatever on the question that concerns us here, it is possibly in the indication it gives that authorization of the search may come from a person in actual lawful possession, and that his rights may not be waived by an owner who has the right to

reclaim possession, but has not done so." And in *Holzhey* v. *United States*, 223 F. 2d 823, 826 (C.A. 5), involving the forced entry by police into a cabinet belonging to appellant located in her relatives' garage, the court held the seized items inadmissible on the ground that the owner of the garage, while consenting to the search of her premises, did not consent to the search of appellant's cabinet. As we have shown, the circumstances in this case were entirely different.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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